UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEPHEN A. DAVIS,	***)***	
	)	
Plaintiff	***)***	
v.	***)***	***Civil No. 95-346-P-C***
	)	
MARVIN T. RUNYON,	***)***	
Postmaster General, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON
DEFENDANTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT

This proceeding arises out of the Postal Service's decision not to hire the plaintiff as a mail handler after a physician engaged by the Postal Service examined him and recommended that he not be permitted to lift more than 45 pounds at a time because of a back impairment. Asserting that he does not suffer from any vocational limitations, the plaintiff seeks redress against Postmaster General Marvin T. Runyon under the Rehabilitation Act and the Age Discrimination in Employment Act ("ADEA"). He also seeks to recover against the physician, Meredith A. Bennet, M.D., and her employer, Occupational Medical Associates (hereinafter "OMA"), based on a state-law theory of injurious falsehood.

Pending are the Postmaster General's motion to dismiss (Docket No. 4), additional motions to dismiss filed by Bennet and OMA[1] (Docket Nos. 11 and 18), and a joint motion of Bennet and

[1] The Bennett and OMA dismissal motions are identical to one another. The plaintiff has moved to strike both of them (Docket No. 25) because they were filed after the clerk had entered the default of these parties on the docket. The court has subsequently granted these defendants' motions (continued...)

OMA for summary judgment (Docket No. 37). For the reasons that follow, I recommend that the Postmaster General's dismissal motion be granted as to one of the four counts pending against him and otherwise denied, that the motions to dismiss filed by Bennet and OMA also be denied, but that summary judgment be entered in favor of Bennet and OMA.

I. Standards for Evaluating the Motions

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc.*

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[1](...continued)
to set aside the defaults. The motion to strike the pending dismissal motions is therefore denied.

v. Town of Dedham, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

In contrast, a motion to dismiss for failure to state a valid claim imposes a significantly less stringent burden on the plaintiff. "When evaluating a motion to dismiss under Rule 12(b)(6),[2] [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). A defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

If, in connection with a Rule 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Fed. R. Civ. P. 12(b). In this instance, the Postmaster General has filed in connection with his Rule 12(b)(6) motion the Declaration of Diane Kelley ("Kelley Declaration") (Docket No. 6). To consider this material would require the court to invoke the conversion provisions of Rule 12(b).

The plaintiff has moved to exclude the Kelley Declaration. (Docket No. 27.) In the alternative, the plaintiff asks the court to do one of two things: (1) continue to treat the Postmaster General's motion as one for dismissal rather than for summary judgment, i.e., by ignoring the

[2] Bennet and OMA also seek dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. As noted *supra* at note 10, that issue does not require discussion.

declaration, or (2) invoke the provisions of Rules 12(b) and 56 that permit the court to defer a summary judgment motion (or a Rule 12(b)(6) motion so converted) until such time as the non-moving party has had an adequate opportunity to marshal a full response.[3] In reply, the Postmaster General takes the position that it is not necessary for the court to consider the Kelley Declaration in order to grant the relief sought in his motion. In the alternative, the Postmaster General contends that no delay in the summary judgment process is warranted here because any inability of the plaintiff to respond is occasioned by his and his attorneys' failure to have adequately prepared their case prior to the filing of their complaint.

The question whether to convert a Rule 12(b)(6) motion into one for summary judgment by considering materials extrinsic to the pleadings lies within the court's discretion. *Snyder v. Talbot*, 836 F. Supp. 19, 21 n.3 (D. Me. 1993) (citations omitted). Given that the Postmaster General, as the moving party, himself asserts that consideration of these materials is not necessary, and because the plaintiff had not had the opportunity to conduct full discovery prior to the filing of his response to the pending motions, I grant the plaintiff's motion to exclude and decline to consider the Kelley Declaration in connection with the Postmaster General's motion to dismiss and so recommend to

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[3] The cited provision of the summary judgment rule provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). In conformity with these provisions, the plaintiff has submitted the affidavit of one of his attorneys, noting that discovery has not commenced and asserting that the matters raised in the Kelley Declaration "purports to set forth material facts that are exclusively within the control of the Postal Service." Affidavit of Louis B. Butterfield (Docket No. 28) at ¶¶ 3-4.

the court.[4] Accordingly, in evaluating the dismissal motion submitted by the Postmaster General, I will consider only the well-pleaded facts as they appear in the complaint, and any plaintiff-favorable inferences to be drawn therefrom. I exclude from this calculus any factual issues generated by the record on the summary judgment motion filed by Bennet and OMA.

III. Factual Context

On the issues relevant to the dismissal motions, the complaint yields the following data: In October 1993 the plaintiff received written notice from the Postal Service that he had been selected for the position of mail handler contingent, *inter alia*, upon his passing a medical examination. Complaint (Docket No. 1) ¶ 10. On November 5, 1993, the plaintiff submitted to a physical examination, arranged by the Postal Service and performed by Bennet. *Id.* at ¶ 11. The Postal Service instructed the plaintiff to report for training on November 15, with his formal employment to begin the following day. *Id.* at ¶ 13. Thereafter, the Postal Service revoked its offer of employment, advising him that records supplied by the U.S. Department of Veterans Affairs (hereinafter the "VA") indicated that the plaintiff suffered from a back disability that prevented him from lifting more than 45 pounds repetitively, thus making him "medically unsuitable" for the position. *Id.* at ¶¶ 14, 18. The Postal Service based its decision solely on Bennet's interpretation of these records. *Id.* at ¶ 15. The plaintiff's spine shows only minimal degenerative disc changes, mild narrowing of the L5-S1 intervertebral disc space and "a slight straightening of the lumbar

[4] This, of course, does not preclude consideration of the Kelley Declaration in connection with the pending summary judgment motion. Indeed, the plaintiff cites this document numerous times in the Statement of Disputed Material Facts that he has submitted in opposition to that motion. *See generally* Plaintiff's Statement of Disputed Material Facts Precluding Summary Judgment in Favor of the OMA Defendants ("Plaintiff's SMF") (Docket No. 42) (referring to this document as the "Second Kelley Affidavit").

lardosis [sic]."[5] *Id*. at ¶ 17. The plaintiff advised the Postal Service that he did not consider himself disabled from performing the duties of mail handler, offering in support of this contention his record of 28 years of service in the Navy in jobs that required heavy lifting, his post-military employment at a store that also required heavy lifting, his medical evaluations by a family physician and an orthopedic specialist, and an additional examination performed by the VA. *Id.* at ¶ 19. The Postal Service nevertheless refused to alter its determination. *Id.* at ¶ 20.

The facts of record relevant to the Bennet and OMA summary judgment motion, viewed in the light most favorable to the plaintiff, can be summarized as follows:

Bennet is a physician licensed to practice in Maine and employed by OMA, where part of her practice involves examining applicants for employment with the Postal Service. Affidavit of Meredith Bennet, M.D. ("Bennet Aff."), Exh. A to Defendants Occupational Medical Associates and Meredith A. Bennet's Statement of Undisputed Material Facts (Docket No. 39), ¶¶ 2, 3 and 4. The plaintiff went to OMA's offices for such an examination on November 5, 1993. *Id.* at ¶ 8. In connection with the examination, Bennet reviewed the plaintiff's medical records as furnished by the VA. *Id.* at ¶ 10; Affidavit of Louis B. Butterfield ("Butterfield Aff.") (Docket No. 44) at ¶ 6 (identifying documents supplied by Bennet to plaintiff in discovery as medical records reviewed by her). These records included a disability rating form, dated May 3, 1991, reporting that the plaintiff had a "history" of "mechanical low back pain with early degenerative disc." Exh. H to Butterfield Aff. at unnumbered page 9. However, this document appears to assign the plaintiff a zero percent

[5] It is not clear what the plaintiff means by this reference. "Lordosis" is an "[a]bnormal anterior convexity of the spine." *Taber's Cyclopedic Medical Dictionary* (1981) at 834. For present purposes, it probably suffices to view the Complaint as alleging generally that the plaintiff suffers from only a minor back problem.

disability rating based on this aspect of his medical history. *Id.*

Part of the examination process involved the plaintiff's completing and submitting to Bennet certain parts of the Postal Service's "Medical Examination & Assessment" form; the plaintiff indicated on the form that he neither suffered nor had ever suffered from any "[b]ack [i]njury or [a]bnormality." Exh. 3 to Kelley Declaration at unnumbered page 3. Bennet then used the form to report her findings to the Postal Service. Bennet Aff. ¶ 12.[6] She stated that her physical examination of the plaintiff revealed a spine that was normal, but in her summary of medical findings she reported "[e]arly DJD lower back with episodic hx [presumably "history of"] low back pain. Exh. 3 to Kelley Declaration at unnumbered pages 4-5. Although, in the section of the form entitled "[p]hysical [f]indings," she listed only a "traumatic amputation" of the ring finger on the plaintiff's left hand, she summarized his medical history as including a history of "low back pain" with "xray changes of early degenerative disc disease." *Id*. at unnumbered page 6. Accordingly, she recommended, in a section of the form labeled "Suggested Accommodations," that the plaintiff "avoid repetitive heavy lifting over 45 lbs."[7] *Id*.

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[6] What Bennet actually states in her affidavit is that she reported her findings at pages 4-6 of an "accurate copy" of the report that she appended to her affidavit. Bennet Aff. ¶ 12. The affidavit, as it appears in the record, includes no attachments. However, the parties are not in dispute over the authenticity of the copy of the form that appears as Exhibit 3 to the Kelley Declaration.

[7] As a result of Bennet's report, the plaintiff asks the court to determine for purposes of the summary judgment motion that Bennet "intentionally disregarded [the plaintiff's] employment history which demonstrated his ability to perform the essential functions of the job." Plaintiff's SMF at 3-4. As a basis for this assertion, the plaintiff contends that Bennet's findings are inconsistent with the medical history the plaintiff provided at the examination as well as a VA determination that the plaintiff has a zero percent disability attributable to his back. *Id.* at 5. The plaintiff further asks the court to determine, for summary judgment purposes, that Bennet intentionally omitted the reference to zero percent disability from her report, and intentionally disregarded the plaintiff's employment history. *Id.* at 6, 7.

(continued...)

III. The Rehabilitation Act Claims

Section 504 of the Rehabilitation Act provides in relevant part that "[n]o otherwise qualified individual . . . shall, solely be reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by . . . the United States Postal Service." 29 U.S.C. § 794(a). Section 501(b) of the Act imposes on the Postal Service an affirmative obligation to to provide adequate hiring, placement and advancement opportunities for individuals with disabilities. 29 U.S.C. § 791(b). In this circuit, either provision may properly form the basis of a civil action alleging discrimination based on disability. *Leary v. Dalton*, 58 F.3d 748, 752 (1st Cir. 1995). The plaintiff does not specify which of these provisions he relies upon in pressing his three claims of unlawful discrimination -- the first alleging that his physical impairment formed the basis of his unlawful non-hiring (Count I), the second alleging that he suffered discrimination based on the postal service's incorrect perception that he suffered from a disability (Count II), and the third a somewhat confusing amalgam of allegations that the Postal Service did not follow its own hiring procedures and that the hiring

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[7](...continued)

These are not the sort of reasonable inferences that the court is required to draw in favor of the non-moving party in the context of a summary judgment motion. There is simply no record basis for determining that Bennet's ultimate advice to the Postal Service -- that the plaintiff should not lift 45 pounds repetitively -- is unwarranted and medically inappropriate because the plaintiff stated that his back was normal, Bennet observed no abnormalities during her physical examination, and a VA examiner apparently attributed zero percent disability to the plaintiff's back at a different and earlier examination. As Bennet and OMA point out, the kind of finding advanced by the plaintiff on the issue of the veracity of Bennet's medical advice to the Postal Service would require expert testimony of evidentiary quality in order to gain the court's imprimatur for summary judgment purposes. Absent such testimony, the requested inferences amount to "unsupported speculation" that is beyond the scope of the plaintiff-favorable but reasonable view of the record required by Rule 56. *McCarthy*, 56 F.3d at 315 (citation omitted).

procedures used by the Postal Service violate the Act by improperly screening out persons who either have disabilities or are perceived as having disabilities.

The regulations of the Equal Employment Opportunity Commission provide interested parties, and the court, with elaboration on who is an individual with a disability[8] within the meaning of the Act. Such a person must have "a physical or mental impairment which substantially limits one or more of such person's major life activities," have "a record of such an impairment," or be "regarded as having such an impairment." 29 CFR § 1614.203(a)(1). In relevant part, a physical impairment is defined as "[a]ny physiological disorder or condition . . . affecting one or more of the following body systems: Neorological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic and lymphatic, skin and endocrine." *Id.* at subsection (a)(2)(i). Major life activities are "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.* at subsection (a)((3).

The Postmaster General contends that the plaintiff has failed to state a valid claim under the Act because the disability alleged by the plaintiff, whether actual or perceived by officials of the Postal Service, is simply a narrow restriction on his ability to perform certain workplace tasks rather than a disability within the meaning of the Act and the implementing regulations. In other words, the Postmaster General's position is that the disqualification of the plaintiff from the job of mail handler does not constitute a substantial limitation on the "major life activity" of work. So it may ultimately prove upon further development of this case, but, in my view, such a determination would

[8] The regulations actually use the term "handicap," although the Rehabilitation Act was amended in 1992 to replace it with the word "disability." *Leary*, 58 F.3d at 749 n.1.

be premature here given the allegations in the plaintiff's complaint.

"An employee is *not* [disabled within the meaning of the Act] merely because he is rejected from the specific job of his choice." *Partlow v. Runyon*, 826 F. Supp. 40, 44 n.3 (D.N.H. 1993) (citations omitted) (emphasis in original).

> The test for whether a *perceived* impairment substantially limits a major life activity is not whether the employer's rejection of the applicant was due to a good faith, narrowly-based decision that the applicant's characteristics did not match specific job requirements. If this were the criteria, most employers would easily escape the requirements of the Act.
>
> Rather, the proper test is whether the impairment, as *perceived*, would affect the individual's ability to find work across the spectrum of same or similar jobs.

Id. at 44 (emphasis in original); *see also Soileau v. Guilford of Maine, Inc*., 928 F.Supp. 37, 50 (D. Me. 1996) (inability to perform certain specific duties not itself sufficient proof of disability). Or, as the First Circuit has noted,

> denying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation[] that would keep h[im] from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if h[is] condition substantially limited a major life activity, *viz*., working.

Cook v. State of Rhode Island, Dep't of Mental Health, Retardation, & Hosp., 10 F.3d 17, 26 (1st Cir. 1993).

> [T]here is a significant legal distinction between rejection based on a job-specific perception that the applicant is unable to excel at a narrow trade and a rejection based on [a] more generalized perception that the applicant is impaired in such a way as would bar h[im] from a large class of jobs.

Id.

The factual allegations in the complaint are sufficient to state a valid claim given the standard articulated in these cases. The plaintiff alleges, in effect, that the Postal Service generally viewed

his real or perceived back problem as a blanket disqualification from a broad spectrum of jobs rather than a narrow trade, and that his impairment, as perceived by the Postal Service, would affect his ability to find employment across that spectrum of positions.

In seeking dismissal of Count III, the Postmaster General points out that the Rehabilitation Act does not allow a plaintiff to pursue a cause of action based on an allegation that the Postal Service failed to follow its own hiring procedures. Responding, the plaintiff avers that Count III is intended to seek redress for the Postal Service's use of employment policies -- although it is not clear whether he refers to the policies as promulgated, as actually applied, or both -- that discriminate in violation of the Rehabilitation Act. I agree with the Postmaster General that no Rehabilitation Act claim is stated by an allegation that the Postal Service deviated from its hiring policies. *See, e.g.*, *Risher v. Aldridge*, 889 F.2d 592, 597 (5th Cir. 1989) (agency disregard of own hiring system does not establish ADEA violation) (citation omitted). To the extent that Count III otherwise alleges that the plaintiff has suffered unlawful discrimination based on his actual or preceived disability, these claims are covered by Counts I and II. Therefore, I recommend dismissal of Count III.

IV. The ADEA Claim

The Postmaster General next contends he is entitled to dismissal of the plaintiff's ADEA claim because the ADEA does not permit a cause of action for discrimination based upon disparate impact. Three years ago, this court reached precisely the opposite conclusion, holding that a plaintiff *could* pursue a claim of age discrimination under the ADEA by alleging disparate impact as opposed to disparate treatment. *Caron v. Scott Paper Co.*, 834 F.Supp. 33, 38 (D. Me. 1993). Finding it "unclear what the Supreme Court will decide when it addresses this issue," the *Caron* opinion

predicted that both the First Circuit and the Supreme Court would recognize an ADEA cause of action based on disparate impact when squarely confronted with the problem. *Id.*

As the Postmaster General points out, there may be sound reasons to make a different prediction. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701 (1993), a disparate treatment case, the Court declined to resolve the disparate impact issue but stressed that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." *Id.*, 113 S.Ct. at 1706. The Court also observed that, "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.* Several circuits have reacted to this dictum in *Hazen* by holding, or at least suggesting, that disparate impact is not a viable theory under the ADEA. *See Ellis v. United Airlines, Inc*., 73 F.3d 999, 1009 (10th Cir.) (no disparate impact treatment claim under ADEA in light of "clear trend" post-*Hazen*), *cert. denied*, 116 S.Ct. 2500 (1996); *Lyon v. Ohio Educ. Assn. & Professional Staff Union*, 53 F.3d 135, 139-40 n. 5 (6th Cir. 1995) (referring to "considerable doubt" though disparate impact claim "may be possible"); *DiBiase v. SmithKline Beecham Corp*., 48 F.3d 719, 732 (3rd Cir.) (plurality opinion, to same effect), *cert. denied*, 116 S.Ct. 306 (1995); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994) (criticizing dissent's disparate impact theory as being of "limited applicability"), *cert. denied*, 115 S.Ct. 2577 (1995).

Notwithstanding this trend in the appellate case law, two district courts elsewhere in this circuit have recently declined to hold that disparate impact claims are unavailable in ADEA cases. *See Camacho v. Sears Roebuck de Puerto Rico*, 939 F.Supp. 113, 121 (D.P.R. 1996) (though considerations discussed in *Hazen* "may show the direction in which the winds are blowing, they are not the stuff on which a trial court may base its interpretation of the law"); *Tucker v. Kingsbury*

Corp., 929 F. Supp. 50, 58 (D.N.H. 1996) (noting plaintiff's concession of "weight of authority" contrary to *Caron*). In *Tucker*, the court simply assumed *arguendo* that disparate impact remained a viable theory but granted summary judgment to the defendant based on the plaintiff's failure to make out a *prima facie* case of discrimination. *Id.* *Camacho* confronts the problem more squarely, rejecting the view of the ADEA reflected in *Hazen* and concluding that the "weight of authority" in this and other circuits remains that "disparate impact is a viable doctrine under the age discrimination law." *Camacho*, 939 F.Supp. at 119 (quoting *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163 (7th Cir. 1992)).

I agree with those two courts that there is reason to question whether *Caron* will turn out to be an accurate prediction of how the Supreme Court or the First Circuit might ultimately treat this issue when confronted with it.[9] But *Caron* is not merely a prediction. It continues to have precedential value in this district. The Postmaster General provides no basis for questioning the reasoning laid out by this court in *Caron*, and accordingly I find no basis for departing from it.

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[9] I must disagree with the Postmaster General's assertion that one can draw any inferences as to the state of the law in this circuit based on the First Circuit's affirmance of this court's decision in *Graffam v. Scott Paper Co*., 870 F. Supp. 389 (D. Me. 1994), *aff'd*, 60 F.3d 809 (1st Cir. 1995) (table). This court's *Graffam* opinion reaffirmed the viability of disparate impact claims under the ADEA, but granted summary judgment to the defendant on other grounds. *Graffam*, 870 F.2d at 392 n.3 and 405. In its unpublished opinion, the First Circuit stated that it assumed *arguendo* that the disparate impact theory remains viable notwithstanding *Hazen*. Unpublished opinions of the First Circuit are inappropriate for citation in unrelated cases, 1st Cir. Loc. R. 36.2(b)(6); *Merrill Lynch, Pierce, Fenner & Smith v. Bishop*, 839 F. Supp. 68, 73 n.3 (D. Me. 1993), in part because unpublished opinions "usually fail to disclose fully the rationale of the court's decision," *Bachelder v. Communications Satellite Corp*., 837 F.2d 519, 523 n.5 (1st Cir. 1988). I am confident that the First Circuit would have published its opinion in *Graffam* had it intended that case to overrule the law in this district as first stated in *Caron* and reiterated in *Graffam*.

V. The Injurious Falsehood Claims

The plaintiff's final two claims do not seek relief against the Postmaster General. They allege the tort of injurious falsehood against Bennet personally and against OMA based upon the theory of *respondeat superior*. In their motions to dismiss, these two defendants contend that Maine law does not recognize such a tort.

To the contrary, the Law Court has recently acknowledged that a plaintiff may pursue such a claim in Maine notwithstanding the dearth of case law on the subject within the jurisdiction. *See Colquhoun v. Webber*, 684 A.2d 405, 1996 WL 592981 at * 3 (Me. Oct. 15, 1996) (noting that the tort of slander of title is of "ancient origin" but had never been presented to Law Court). In explicitly recognizing a cause of action for slander of title, the court noted that it "is a form of the tort of injurious falsehood that protects a person's property interest against words or conduct which bring or tend to bring the validity of that interest into question." *Id.*

The instant case is obviously not one involving slander of title. But, as the plaintiff points out, the *Restatement (Second) of Torts* (hereinafter *"Restatement"*) makes clear that injurious falsehood is not limited to cases in which the tortfeasor disparages an interest in real property or, indeed, property generally. *Restatement* § 623A cmt. a. Rather, the general rule is that "[o]ne who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss" in certain circumstances. *Id.* at § 623A; *see also* W. Keeton et al., *Prosser and Keeton on Torts* (hereinafter *"Prosser"*) § 128 at 966 (5th ed. 1984) ("entirely too much emphasis has been placed upon the property element" of injurious falsehood; "gist of the tort is the interference with the prospect of sale or some other advantageous relation"). Indeed, the *Restatement* drafters envisioned such a claim by an employee who suffers a pecuniary loss resulting from false statements made by

a physician who examined the employee on behalf of the company. *Id.* at cmt. a, illus. 5.

In its *Colquhoun* decision, the Law Court adopted the *Restatement's* approach as to the slander-of-title branch of the tort of injurious falsehood. *See Colquhoun*, 1996 WL 592981 at *4 (citing *Restatement* § 624 and holding that title by adverse possession sufficient basis for slander-of-title claim). Given that Maine law has also followed the *Restatement* on the closely related tort of defamation, *Rippett v. Bemis*, 672 A.2d 82, 86 (Me. 1996), there is no reason to suppose that the Law Court would not adopt the general principles of injurious falsehood set out at section 623A of the *Restatement* when the appropriate case arises.

Moreover, the court is obliged to evaluate a motion to dismiss "in light of the liberal notice pleading requirements of the Federal Rules of Civil Procedure." *Cutler v. F.D.I.C.*, 781 F. Supp. 816, 821 n. 14 (D. Me. 1992) (citation omitted). One aspect of notice pleading is the concept that "when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage," as long as there is no prejudice to the defendant's ability to defend against the claim. 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1219 at 192-94 (1990) (citations omitted). The plaintiff contends that, even if Maine law were not to recognize the tort of injurious falsehood as applied to the facts he alleges, his claims against Bennet and OMA must survive because in that instance they would state valid claims of defamation. The tort of injurious falsehood as recognized by the *Restatement* is "similar in many respects to the action for defamation." *Restatement*, Introductory Note to § 623A at 333; see also *Prosser* at 964 ("not always easy" to distinguish between injurious falsehood and defamation). Bennet and OMA were the first to make the argument that the claims against them sound in defamation, taking that position in connection with their successful effort to set aside the court's entry of defaults against them. More

recently, in their summary judgment motion, these defendants have invoked the Law Court's significant body of defamation case law in support of their position. In these circumstances, it cannot be said that Bennet and OMA would suffer prejudice if the plaintiff were permitted to go forward on a defamation-based theory of recovery. Accordingly, even if I were to conclude that Maine law does not recognize the plaintiff's cause of action for injurious falsehood, I would permit his claims against Bennet and OMA to go forward under the law of defamation. Therefore, I recommend that the motions to dismiss filed by Bennet and OMA be denied.[10]

VI. The Maine Health Security Act

The remaining issues come to the fore via the summary judgment motion filed by Bennet and OMA. They first contend they are entitled to summary judgment because the plaintiff has failed to submit his claims against them for pre-litigation screening as required by the Maine Health Security Act, 24 M.R.S.A. § 2501 *et seq*. I agree with the plaintiff that these defendants have waived this affirmative defense by failing to raise it in their answer. *Dougherty v. Oliviero*, 427 A.2d 487, 489 (Me. 1981); Fed. R. Civ. P. 8(c).

Bennet and OMA contend that *Dougherty* is not applicable because that case dealt only with the requirement that a plaintiff pursuing a cause of action against a health care professional furnish the defendant with a notice of claim prior to the commencement of the lawsuit. At the time *Dougherty* was decided, the applicable provision of the Health Security Act -- 24 M.R.S.A. § 2903 -- contained only the notice-of-claim requirement. *See Dougherty*, 427 A.2d at 488 n.1 (quoting

[10] Because I conclude that the plaintiff's federal claims against the Postmaster General should not be dismissed, I need not address the contentions of Bennet and OMA that the court should dismiss the state-law claims against them on jurisdictional grounds.

statute). Section 2903 has been subsequently amended, but still sets forth that "no action for professional negligence"[11] shall be commenced until the plaintiff has taken certain steps. Rather than simply require a notice of claim, however, section 2903 now imposes upon plaintiffs the additional obligation of submitting their claims for prelitigation screening pursuant to Subchapter IV-A of the Act.[12] The basic structure of section 2903, as a bar to civil actions in certain circumstances, has remained unchanged since *Dougherty*. And the holding in *Dougherty* is unambiguous: "failure to comply with section 2903 is an affirmative defense and is waived if not raised by the defendant." *Dougherty*, 427 A.2d at 489.

It is therefore not necessary to determine whether Bennett and OMA are correct in their

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[11] In fact, the version of section 2903 at issue in *Dougherty* did not use the phrase "professional negligence," but rather "death or injuries to the person arising from any medical, surgical or dental treatment, omission or operation." *Dougherty*, 427 A.2d at 488 n.1. The distinction is not material for purposes of determining whether compliance with section 2903 remains an affirmative defense.

[12] The relevant portion of Section 2903 now reads in its entirety:

> **1. Commencement of action**. No action for professional negligence may be commenced until the plaintiff has:
>
> > **A**. Served and filed written notice of claim in accordance with section 2853;
> >
> > **B**. Complied with the provisions of subchapter IV-A; and
> >
> > **C**. Determined that the time periods provided in section 2859 have expired.

24 M.R.S.A. § 2903(1). Section 2853 describes the process whereby the service and filing in state court of such a notice trigger the prelitigation screening process. *Id.* at § 2853. Section 2859, in turn, permits a plaintiff to bring an action for professional negligence 175 days after serving a notice of claim on the defendant if the pre-litigation screening panel has not rendered a decision. *Id.* at § 2859.

contention that the counts applicable to them make this an action for "professional negligence" within the meaning of the Health Security Act, thus triggering the requirement that the plaintiff submit his claims for pre-litigation screening. *See* 24 M.R.S.A. § 2903 (plaintiff may not commence "action for professional negligence" prior to, *inter alia*, compliance with pre-litigation screening process); *id*. at § 2502 (defining "action for professional negligence" as "any action for damages for injury or death against any health care provider . . . whether based upon tort or breach of contract or otherwise, arising out of the provision or failure to provide health care services").

VII. The Fact/Opinion Distinction

Bennet and OMA next contend that they are entitled to judgment in their favor because the statements made by Bennet are opinion rather than assertions of fact and are therefore non-actionable, and because the statements made by Bennet were conditionally privileged. I agree.

The plaintiff does not contest the preliminary assertion, made by Bennet and OMA, that in a case alleging injurious falsehood the Law Court would apply the distinction, as developed in the context of defamation, between actionable assertions of fact and non-actionable expressions of opinion. Rather, the plaintiff's position is that the statements made by Bennet are not opinion as that concept has been defined by the Law Court and the U.S. Supreme Court.

"The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law." *True v. Ladner*, 513 A.2d 257, 262 (Me. 1986) (citation omitted). The inquiry "looks to the totality of the circumstances." *Lester v. Powers*, 596 A.2d 65, 71 (Me. 1991).

As a matter of federal constitutional law, statements that carry the label of "opinion" are not thereby automatically protected from generating liability. *Milkovich v. Lorain Journal Co.*, 497 U.S.

1, 18 (1990). Although "[u]nder the First Amendment there is no such thing as a false idea," *id.* (quoting *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 339-40 (1974)), the question is whether a reasonable factfinder could conclude that a self-proclaimed statement of opinion implies an assertion of fact, i.e., it is an assertion that is "susceptible of being proved true or false,"*Milkovich*, 497 U.S. at 21. If so, the First Amendment provides no "separate constitutional privilege" based on the statement's status as opinion. *Id.*

Although the Law Court has stated that its interpretation of the fact-opinion distinction "comports with" the *Milkovich* standard, *Lester*, 596 A.2d at 71 n.9, it would appear that the common law of Maine is somewhat more defendant-favorable. The baseline is *Caron v. Bangor Publishing Co*., 470 A.2d 782 (Me.), *cert. denied*, 467 U.S. 1241 (1984). In that case, the court noted that "a comment, ostensibly in the form of a statement of fact, is an opinion if it is clear from the surrounding circumstances that the maker of the statement did not intend to state an objective fact but intended rather to make a personal observation on the facts." *Id.* at 784 (citations omitted). The "crucial difference" between fact and opinion was defined as depending on "whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." *Id.* at 785 (citation omitted). Thus, a newspaper was expressing non-actionable opinion by asserting in an editorial that an overweight police officer was not fit for his position. *Id.* Likewise, summary judgment was appropriate in connection with an assertion that an employee who crossed a picket line during a strike "ha[d] no morals" because "the reader [was] free to evaluate that characterization on the basis of disclosed facts that [were] admittedly correct." *Fortier v. International Bhd. of Elec. Workers, Local 2327*, 605 A.2d 79, 80 (Me. 1992) (citation omitted). The court noted that "[a]

statement is not actionable if it is clear the maker did not intend to state an objective fact but rather to present an interpretation of the facts." *Id.* (citing *Caron, supra*).

On the other hand, "[a] statement ostensibly in the form of an opinion is actionable if it implies the allegation of undisclosed defamatory facts as the basis of the opinion." *True*, 513 A.2d at 262. Therefore, it was proper for a jury to consider and find defamatory statements that a plaintiff was not a good teacher (implying existence of unfavorable teaching evaluations), that he was "more concerned with living up to the terms of his contract rather than going the extra mile" (implying a failure to assume responsibilities not required by contract) and that the plaintiff failed to "turn[] the students on" (implying a lack of student initiative and poor student performance). *Id.* at 262; *see also Lester*, 596 A.2d at 71 (to similar effect, concerning statements that a professor was "homophobic" and likely to retaliate against student complaints). Similarly, it was proper for a jury to determine that the statement "I hear you hired the drunk," made by one customer of a building contractor to another, was a factual assertion. *Haworth v. Feigon*, 623 A.2d 150, 156 (Me. 1993). "When the statements are ambiguous and capable of equally reasonable conflicting interpretations, they should be submitted to the jury." *Id.* at n.3 (citation omitted). And a defendant's statement that he had "reason to believe" the plaintiff had sabotaged his employer's computers was also tortious because of its implied assertion of fact. *Staples v. Bangor Hydro-Electric Co.*, 629 A.2d 601, 603 (Me. 1993).

In light of these precedents, I conclude as a matter of law that the statements made by Bennet are opinion and therefore not actionable as an injurious falsehood. As in *Caron* and *Fortier*, the underlying facts that informed Bennet's opinion were fully disclosed along with her conclusion that the plaintiff should avoid repetitive heavy lifting over 45 pounds. Her recommendations do not

imply the existence of undisclosed defamatory facts, but rather express an opinion with which the plaintiff disagrees but that is based on factual data that accompanied her opinion.

VII. Conditional Privilege

Moreover, even if I were to conclude that a reasonable jury could find undisclosed defamatory falsehoods in Bennet's expression of opinion, her report to the Postal Service would still be non-actionable because Bennet was conditionally privileged to make such statements in the circumstances. In the defamation context, Maine law recognizes that "a conditional privilege may arise in any situation in which an important interest of the recipient of a defamatory statement will be advanced by frank communication." *Rippett*, 672 A.2d at 87 (citation omitted). Here, the plaintiff agrees with the assertion of Bennet and OMA that Bennet a enjoyed a conditional privilege concerning her communication with the Postal Service about the plaintiff. But it is the plaintiff's position that summary judgment is nevertheless inappropriate given the possibility that Bennet tortiously exceeded the scope of the privilege.

> Even a conditionally privileged defendant is liable for defamation if [s]he knows [her] statement to be false, recklessly disregards its truth or falsity, or acts with spite or ill will. Whether a defendant so abused a conditional privilege is a question of fact. Evidence is sufficient to support a finding of reckless disregard for the truth if it establishes that the maker of a statement had "a high degree of awareness of probable falsity or serious doubt as to the truth of the statement."

Id. (quoting *Onat v. Penobscot Bay Medical Center*, 574 A.2d 872, 874 (Me. 1990); other citations omitted). Indeed, the Law Court held in *Colquhoun* that malice or reckless disregard of the statement's falsity constitute an element of the tort of slander of title, and a fair reading of the opinion would be that they constitute an element of the tort of injurious falsehood generally. *Colquhoun*, 1996 WL 592981 at *3 (citing, generally, *Prosser* § 128; other citations omitted); *see*

also Restatement § 623A (setting forth such an element); *Prosser* § 128 at 970 (adopting *Restatement* formulation as likely contours of tort).

In opposing summary judgment, the plaintiff contends that a genuine issue of material fact exists as to whether Bennet acted in reckless disregard of the truth or falsity of her statements. To support that contention, the plaintiff takes the position that Bennet's statements are inconsistent with both the medical history provided by the plaintiff during his examination and the VA records determining that the plaintiff had a zero percent disability attributable to his back. The plaintiff further maintains that Bennet's allegedly tortious statements are inconsistent with her own finding that the plaintiff's only physical limitation relates to the loss of one of his fingers, as well as her statement to the plaintiff at the examination that he was fit for duty. Finally, without citation to authority, the plaintiff contends that Bennet's recklessness is a state-of-mind issue that is, at the least, inappropriate for determination at the present juncture given that no depositions had been conducted in the case as of the date on which the plaintiff filed his opposition to the motion at issue.

As noted, *supra*, Fed R. Civ. P. 56(f) explicitly authorizes the court to deny or defer a summary judgment motion purely because the non-moving party has not had an opportunity to develop facts that are essential to support that party's position. Rule 56(f) requires the non-moving party to support his position as to deferral by affidavit. In contrast to the plaintiff's effort to resist the Postmaster General's effort to introduce matters outside the pleadings in connection with his motion for dismissal, the plaintiff has not so supported his position as to the summary judgment of Bennet and OMA. Nevertheless, given the rule's "salutary purposes," the court "should construe motions that invoke [Rule 56(f)] generously, holding parties to the rule's spirit rather than its letter." *Resolution Trust Corp. v. North Bridge Assoc., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994) (citation

omitted). This liberality has its limits, however. A court may deny a Rule 56(f) request for deferred consideration of a summary judgment motion when such a delay would be "an exercise in futility." *Id.* (citation omitted).

Deferral here would be such an exercise, for the simple reason that the plaintiff vastly exaggerates the significance of Bennet's state of mind to the issue of whether she acted in reckless disregard of the truth or falsity of her statements. As the First Circuit has observed in another injurious falsehood case, "[a] court typically will infer actual malice [as that term is used in *New York Times v. Sullivan* and its progeny] from objective facts." *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 196 (1st Cir. 1982) (citing *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1965); other citation omitted), *aff'd*, 466 U.S. 485 (1984). Concerning reckless disregard for truth or falsity, the objective facts will generally apply by inference, because "it would be rare for a defendant to admit such doubts." *Bose*, 692 F.2d at 196 (citation omitted). The two affidavits executed by Bennet and appearing in the record demonstrate that Bennet would not make such an admission if deposed. Her position is that the medical history given by the plaintiff, her own examination and the medical records from the Veterans Administration were "consistent with" early degenerative disc disease, and that it would have been "inconsistent with good medical practice" not to recommend his avoiding the repetitive heavy lifting of more than 45 pounds. Affidavit of Meredith A. Bennet (Docket No. 13) at ¶ 5; Affidavit of Meredith A. Bennet (Docket No. 21) at ¶ 5.

The plaintiff does not here contend that the record is lacking objective evidence. Indeed, it is difficult to imagine what more objective evidence might be brought to bear on the problem at hand, because, from the plaintiff's perspective, the court has before it everything that could be relevant: the data made available to Bennet at the time of the examination, the plaintiff's account

of the information he shared with Bennet, and the written record of the examination that Bennet made and transmitted to the Postal Service.

In these circumstances, the court should not only decline to hold the summary judgment motion in abeyance pursuant to Rule 56(f) but it should not hesitate in granting summary judgment in favor of Bennet and OMA. The evidence of record would not permit a rational factfinder to draw an inference that Bennet acted in reckless disregard of the truth or falsity of the assertions she made in her evaluation. As the plaintiff himself notes in his Statement of Disputed Material Facts, Bennet's finding as to the condition of the plaintiff's back was "nothing more than a transcription of one reference on medical records prepared by the Veterans Administration." Plaintiff's SMF at 6. It may be, and for summary judgment purposes the court should assume, that another physician presented with the same raw medical data would not make as conservative a recommendation concerning the plaintiff's ability to lift objects in the workplace. What is involved is essentially a prediction of the plaintiff's future ability to perform work. Even assuming that such a prediction involves a factual assertion that is capable of being determined to be true or false, there is not a scintilla of evidence that supports a determination that Bennet acted with recklessness in evaluating the data that formed the basis of her recommendation.

IX. Conclusion

For the foregoing reasons, I recommend that the Postmaster General's motion to dismiss be **DENIED** as to Counts I, II and IV but **GRANTED** as to Count III; that the motion to dismiss filed by defendants Bennet and OMA be **DENIED**; and that the motion for summary judgment filed by defendants Bennet and OMA be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 23rd day of December, 1996.

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David M. Cohen
United States Magistrate Judge